UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LIBERTY BAKERY KITCHEN, INC.

and

Case Nos. 01–CA–181081
01–CA–191349

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 653

Daniel F. Fein, Esq. and *Emily G. Goldman, Esq.*,
for the General Counsel.
Geoffrey P. Wermuth, Esq. (*Murphy, Hesse, Toomey & Lehane, LLP)*, of Quincy, Massachusetts,
for the Respondent.
Nicholas M. Chalupa, Esq. (*Feinberg, Campbell & Zack, P.C.*), of Boston, Massachusetts,
for the Charging Party.

DECISION

ELIZABETH M. TAFE, Administrative Law Judge. This case concerns a commercial bakery's withdrawal of recognition of its delivery drivers' union. The bakery withdrew recognition based on signatures of a majority of the drivers on a page that contained summaries of relevant Board law and procedures, excerpted from the NLRB's website and public information. The General Counsel alleges that the withdrawal of recognition was unlawful because the bakery did not have objective evidence of actual loss of majority support. The General Counsel also alleges that a supervisor unlawfully interrogated a driver about the decertification effort and/or solicited his support. Finally, the General Counsel alleges the bakery unlawfully granted wage increases after the withdrawal of recognition.[1] The bakery denies violating the Act. Regarding the withdrawal of recognition, it asserts that the page of signatures was sufficient objective evidence to support a conclusion that the union had lost majority support.

As discussed below, I find that the evidence fails to establish that there was objective evidence of an actual loss of majority support, as is required by the Board's current standard set forth in *Levitz Furniture of the Pacific,* 333 NLRB 717 (2001), because the employees' intent was not clear and cannot be interpreted as more reasonably read to express nonsupport for the union rather than a desire for a secret-ballot election. Consequently, I find the subsequent failures to bargain and the unilaterally implemented wage increases were unlawful. I further find that the wage increases were discriminatorily motivated. As for the alleged unlawful statements, I find the interrogation unlawful, but that the unlawful solicitation allegation is not supported and that allegation is dismissed.

[1] The General Counsel also urges the Board to reconsider its legal standard set forth in *Levitz Furniture*, below, arguing, inter alia, that it has been shown to be unworkable. As explained below, I am bound by current Board precedent and leave it to the Board, at its discretion, to consider the parties' positions on this question.

STATEMENT OF THE CASE

On July 27, 2016, The International Brotherhood of Teamsters, Local 653 (Union or Charging Party) filed an unfair labor practice charge against Liberty Bakery Kitchens, Inc. (Respondent or Liberty), docketed by Region One of the National Labor Relations Board (Board or NLRB) as Case 01–CA–181081. The Union filed amended charges on October 26, 2016, and January 13, 2017. The Union filed a charge and an amended charge in Case 01–CA–191349 on January 17, 2017, and January 26, 2017, respectively.

On November 30, 2016, based on an investigation into the charge filed in Case 01–CA–181081, the General Counsel, by the Regional Director for Region One, issued a complaint and notice of hearing against Liberty. On January 13, 2017, the General Counsel filed an amended complaint, alleging violations of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). The Respondent filed timely answers to the complaint and amended complaint, denying all violations of the Act. On January 27, 2017, the General Counsel filed a Notice of Intent to Amend the Complaint to consolidate Cases 01–CA–181081 and 01–CA–191349 and alleged additional violations of Section 8(a)(5), (3), and (1) of the Act. The Respondent objected to the Notice of Intent to Amend.

A 2-day trial was conducted on January 31 and February 2, 2017, in Boston, Massachusetts, at which time all parties had an opportunity to present evidence and to call and examine witnesses. I granted the General Counsel's motion to amend the complaint pursuant to the Notice of Intent to Amend over the Respondent's objections.[2] Counsel for the General Counsel and the Respondent filed posthearing briefs.

[2] I overruled the Respondent's objections that the amendments were unfair and violated due process. Pursuant Section 102.17 of the Board's Rules and Regulations, I granted the General Counsel's motion to amend the complaint as described in GC Exh. 1(r), Notice of Intent to Amend Amended Complaint. The new allegations in Case 01–CA–191349 relate to wage increases that occurred several months after the incidents alleged in the complaint. The new charge was served 2 weeks before the hearing opened, and the Notice of Intent to Amend was served 2 working days before the hearing opened. Although the new allegations are factually related to the original complaint allegations, significantly, the new allegations include an 8(a)(3) theory, which is substantively different from the 8(a)(5) and (1) allegations in the amended complaint, requiring the Respondent to prepare a different defense. That said, the new allegations relate to a discrete wage increase relevant to issues in the complaint. My ruling recognized that the new allegations cause some burden to the Respondent, but I found that the Respondent was not prejudiced by the addition of the new allegations. The Respondent had an opportunity to request additional time to prepare a defense after the General Counsel rested, which the Respondent did not seek. The Respondent also had an extra day between hearing dates to respond to the General Counsel's related subpoena requests. On brief, the Respondent renews its objection and asks me to reconsider this ruling; however, the Respondent raises no new issues not already considered. I reaffirm my ruling to allow the amendment.

I grant General Counsel's unopposed posthearing motion to supplement the record due to administrative omissions. I thereby receive the following exhibits: GC Exh. 1(s), Corrected Notice of Intent to Amend the Amended Complaint; GC Exh. 1(t), Email confirming service of GC Exh. 1(s); and amendments to GC Exh. 1(q), the index to the formal papers, to include GC Exhs. 1(r) to (t). Hereafter, I refer to the amended complaint, as consolidated and further amended by the Corrected Notice of Intent to Amend, simply as the complaint. I note that the correction to GC Exh. 1(r) as evidenced in GC Exh. 1(s) changes only the service date of the amended charge in 01–CA–191349 from January 26 to January 27, 2017.

On the entire record,[3] including my observations of the demeanor of the witnesses, and after considering arguments made at the trial and in posthearing briefs, I make the following findings, conclusions of law, and recommended remedy and order.

FINDINGS OF FACT

I. Jurisdiction

The Respondent admits, and I find, that it is a corporation with an office and place of business in Brockton, Massachusetts, where it engages in the business of production, nonretail sale, and distribution of food products. The Respondent further admits, and I find, that it annually sells goods valued in excess of $50,000 directly to customers outside the Commonwealth of Massachusetts, and annually purchases and receives goods valued in excess of $50,000 directly from other enterprises located within the Commonwealth of Massachusetts who had received those goods directly from points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I find, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. Alleged Unfair Labor Practices

A. The Parties and Their Relationship

Liberty is a commercial bakery that produces, processes, and delivers donuts and other baked goods to stores, including Dunkin' Donuts stores. It employs 14 delivery drivers and almost 100 "inside" employees, including bakers, production employees (finishers and packers) and cleaners. Paul H. Wright, who testified at the hearing, has been the general manager for about 10 years. He runs the operation, ensuring that the building is operational, and that employees are available and trained to make and distribute the products daily. He is also responsible for interacting with the accountants in the production of financial statements. Two production managers report to Wright, one of whom is always on duty. Department heads or managers report to the production managers, and supervisors report to the department heads and managers. Some employees speak English; others speak several dialects of Portuguese, including Cape Verdean and Brazilian dialects. Some employees function in both English and Portuguese. Typically, the drivers work overnight shifts delivering products.

On May 8, 2015, following an election conducted by the NLRB, the Union was certified as the exclusive collective-bargaining representative of Respondent's delivery drivers.[4] Driver Thomas E. Lydon, III was elected union steward and continues to serve in that role. Lydon has worked for Liberty as a delivery driver since July 4, 2004. His shift begins between midnight and 1:30 a.m. and ends about 8 a.m. Lydon participated in collective bargaining on behalf of the Union as a member of the Union's contract

[3] I grant the Respondent's implied motion at R. Brief at 7, fn. 2 to correct the official transcript at Tr. 39:10–13, so that the transcript reads:

Q Okay, thank you. And since July 25th 2016, you have not been in communication phone or email, for example, with the Union regarding Liberty Bakery's drivers for any other reason, is that correct?
A Correct.

[4] The certified bargaining unit is described in GC Exh. 2:

All full-time and regular part-time drivers employed by the Employer at its 125 Liberty Street, Brockton, Massachusetts facility, but excluding office clerical employees, all other employees, guards, and supervisors, as defined in the Act.

negotiations team, for which the Union reimbursed his lost wages.[5] Brian McElhaney from the Union and Attorney Nicholas Chalupa also participated on behalf of the Union. Wright and attorney Geoffrey Wermuth participated in negotiations for the Respondent. The parties met about nine times from July 2015 through July 2016 and reached tentative agreements on certain noneconomic terms as set forth in Jt. Exh.1(A)(1) to (3), but they never concluded a complete collective-bargaining agreement.

At the hearing it was revealed that the Union was attempting to organize the "inside" or production employees in a separate bargaining unit in January 2017, and that a related representation petition was pending. The record does not establish when organizing of these employees began, or when the Respondent knew of these organizing efforts.[6]

B. Employee Disaffection in Spring 2016 and Respondent's Withdrawal of Recognition

1. <u>Initiation of employees' efforts against the union</u>.

On about May 25, 2016, three drivers, Frederick Robinson, Emanuel Cunningham, and Emilio Depina, approached Wright in his office and asked him for information "on how to get out of the Union or get the Union out." (Tr. 33:24–34:2.) They asked him "if there is a way to 'get the Union out of here.'" (Jt. Exh. 1(F).) The record does not establish the precise words that any one employee actually said to Wright in this encounter, or who said what, and none of the three employees was called to testify. As set forth in Joint Exhibit 1(F) and Wright's testimony, Wright responded that he thought there was a way, but that they would have to do the work themselves. "They" reportedly asked him if he could get information about what they needed to do. Wright emailed his attorney, Wermuth, to inquire, and Wermuth sent him an email containing the information in Joint Exhibit 1(G). Wermuth represented that he obtained the information in Joint Exhibit 1(G) from the NLRB's public website and from a May 9, 2016 General Counsel's memorandum referring to extant Board law. This "informative page" was not designed to be a petition. With Joint Exhibit 1(G), Wermuth also sent a 2-page copy of *Description of Representation Case Procedures in Certification and Decertification Cases, Form NLRB-4812 (4-15).* (GC Exh. 3(a)-(b).)[7] Joint Exhibit 1(G) states in its entirety (format in original):

> From <u>www.nlrb.gov</u>:
>
> <u>Decertification election</u>
> Have a union, but don't want it anymore, or want a different one?
>
> Under certain circumstances, you can vote out or "decertify" your union, or replace it with a different union. At least 30% of your coworkers must sign cards or a petition asking the NLRB to conduct an election. Unless a majority of the votes cast in the election are in favor of union representation, the union it will be decertified [sic]. Such elections are barred, however, for one year following the union's certification by the NLRB. Plus, if your employer and union reach a collective-bargaining agreement, you cannot ask for a decertification election (or an election to bring in another union) during the first three years of that agreement, except during a 30-day "window period." That period begins 90 days and ends 60 days before the agreement expires (120 and 90 days if your employer is a healthcare institution). After a collective-bargaining agreement passes the three-year mark or expires, you may ask for an election to decertify your union or to vote in another union at any time.

[5] Lydon was not paid for union organizing.

[6] Although some facts overlap, the status or fate of the "inside" employees' representation petition is not the subject of the present case.

[7] The record does not establish whether these attachments were also provided to Robinson with the informative page.

[The petition must be filed with the National Labor Relations Board, Region 1, 10 Causeway St., 6th Floor, Boston, MA 02222-1072, (617) 565-6700.]

From the NLRB General Counsel MEMORANDUM GC 16-03, May 09, 2016:

> Extant Board law permits employers to unilaterally withdraw recognition from an incumbent union based on objective evidence that the union has actually lost majority support. See Levitz Furniture Co. of the Pacific, 333 NLRB 717, 717 (2001).

A few days after receiving it from Wermuth on May 25, Wright gave a copy of Joint Exhibit 1(G) to Robinson.

2. Supervisor Rodrigues' statements.

Employee Lawrence Leonard testified at the hearing. He has worked for Liberty for 11 years as a driver. Leonard usually works nights from about 12:30 a.m. to 6:30 a.m., Friday through Tuesday. Like the other drivers, he loads his truck at the beginning of his shift, then delivers baked goods to Dunkin' Donuts stores. He returns at about 4:30 or 5 a.m. and unloads the truck, which is then cleaned by other employees. Marcelino (Charlie) Rodrigues is his direct supervisor. Employee Robinson is Rodrigues' son-in-law.

One morning in mid-July, when Leonard was unloading his truck at the end of a shift, Robinson approached him about signing a document. According to Leonard, Robinson said that he was "sending a piece of white paper for the truck drivers to sign, because they wanted to vote out the union." (Tr. 85:18.) Robinson asked Leonard if he wanted to sign it, and Leonard declined. Robinson said that if he signed it, he wouldn't have to worry about getting fired, and Leonard did not respond. Robinson offered to show Leonard the white piece of paper with names on it. Leonard apparently did not respond and the conversation ended.

According to Leonard, about a half hour after speaking with Robinson, he passed Supervisor Rodrigues in the parking lot after he had punched out. Leonard said, see you tonight. Rodrigues said to Leonard, "so, Larry, do you want to sign that?" Leonard asked, "what?" Rodrigues responded, "you know what." Leonard said that he "did not want to get involved." Rodrigues said, "you are involved." (Tr. 85:25-86:10.) Leonard testified that he understood Rodrigues to be referring to the paper Robinson had asked him to sign. He testified that he understood what Rodrigues meant and told him he did not want to get involved, because, earlier while unloading trucks on the dock, he observed that everyone was "in a commotion about the Union gone." They were happy about it, but he was in shock, because he was "the last person to know about this white piece of paper."[8] (Tr. 86:11-87:2.) Upon exiting the parking area, Leonard had a brief exchange with coworker Pierre about whether Rodrigues had asked Pierre to sign the paper.[9]

Neither Rodrigues nor Robinson was called to testify.

3. Compilation of employee signatures and withdrawal of recognition.

On about July 19, 2016, Robinson returned to Wright a copy of Joint Exhibit 1(G) with the signatures of nine drivers added to it (Jt. Exh. 1(H)). Wright recognized these signatures to be those of

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[8] At the hearing, counsel for the General Counsel occasionally referred to a "blank" piece of paper, but the witnesses did not use that term.

[9] I deny the Respondent's request on brief that I reconsider its hearsay objection to the admission of evidence of this conversation, which was not admitted for the truth of what Pierre said.

nine bargaining unit employees.[10] At the time, there were 14 drivers in the bargaining unit. The only markings on Joint Exhibit 1(H) were the signatures, numbered one to nine. After consulting with Wermuth, Wright provided additional language to Robinson and told Robinson that based on the information he had received from attorney Wermuth, Robinson would need to add that language to Joint Exhibit 1(H). Per Wright's instructions, Robinson returned the "informative page" to Wright, now containing the suggested additional language in handwriting and signed by Robinson (Jt. Exh. 1(I)).[11] The additional, handwritten language states:

> This petition is to request our employer Liberty Bakery. Inc. to withdraw recognition from teamsters Local 653. I Frederick Robinson certify that all the people who sign this petition did so after May 25, 2016. [signed by Robinson]

Wright sent Joint Exhibit 1(I) to Wermuth shortly after he received it. On July 25, 2016, relying on this "petition" the Respondent withdrew recognition of the Union by a letter from Wermuth to Chalupa (Jt. Exh. 1(K)). The signatures represent nine of the 14 drivers at the time, a clear majority of bargaining unit employees.[12] The Respondent cancelled scheduled bargaining sessions and has not met with the Union for purposes of collective bargaining or any other reason concerning its drivers since then.

No employee who signed the informative page testified at the hearing.

C. November 2016 Wage Increases

The parties stipulated that the Respondent granted wage increases to its 14 drivers on November 19, 2016. (See Jt. Exh. 2; Tr. 21:13-22:12.) Other than the 50-cent raises drivers typically received when they completed an initial probationary period, the drivers had not received raises since January 2011. The parties further stipulated that the November 19, 2016 wage increases were made without notice or opportunity to bargain with the Union.

The November 2016 increases ranged from $1.50 to $3 per hour, reflecting percentage increases of from 8.9 to 27.3 percent. All but 2 drivers (12 of the 14) received a $3 per hour raise. Similarly, all but two received increases of between 23.8 and 27.3 percent. Lydon, the union steward, received a $1.90 raise, representing a 14.9 percent raise. General Manager Wright explained that he made the decision to give the drivers increases because they hadn't received wage increases in 5 years, while the other employees, had received increases in January 2015, 2016, and 2017, due to increases in the mandated state minimum wage in Massachusetts. Wright testified that the Board of Directors left the decisions regarding the wage increases to his complete discretion, including both when to give raises and how much. Wright explained that the state minimum wage had increased by $1 each of those 3 years, which influenced his decision that the $3 increase was appropriate. He explained that he decided whether to give drivers a $3 raise or a lower raise for different reasons, and that only a couple of individuals were affected. Wright explained that he gave employee Desena a $1.50 raise because he was already making a significantly higher wage due to

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[10] The informative page was signed by the three drivers who originally approached Wright on May 25 with questions about ousting the Union and six others.

[11] At the hearing, I received the parties' stipulation that the marks jotted to the right of each signature on Jt. Exh. 1(I) were inadvertently made by counsel and have no meaning or relevance on this the record.

There is no allegation that the Respondent's sharing of this information about the decertification and withdrawal of recognition procedures with Robinson was unlawful; I find, based on this record, that the Respondent's assistance was no more than permissive, ministerial assistance.

[12] Jt. Exh. 3(b), Attachments B and C, shows there were 14 drivers in April 2016 and 14 drivers in November 2016. I infer from this that there were at least 14 drivers on July 25, 2016, when the Respondent withdrew recognition. Although Jt. Exh. 3(b), Attachment A suggests there were 18 drivers in March 2015, no evidence establishes or even suggests that the nine signatures on Jt. Exh. 1(H) and (I) did not represent a majority of bargaining unit employees in July 2016.

having previously worked as a baker. He gave Lydon only a $1.90 increase, because he determined that $14.65 would be the "cap" for drivers' wages. He explained that Lydon's initial $12.75 hourly wage was higher than many of the other drivers already because of longevity and the fact that many drivers were new. He explained that many drivers involved in the Union had left, so many drivers were making $11 per hour, the standard starting rate after a drivers' probation period. All but Desena, who was already earning $16.80 per hour, were making between $11 and $12.75 before the increases, nine of whom were making $11 per hour. Wright also explained that he granted employee Tavares, who had been earning $12.60 per hour a full $3 raise that brought him above the $14.65 "cap" because Tavares also worked at a mechanic. Wright explained that he had "really no reason" to establish the $14.65 wage cap. (Tr. 138:21–22.) He had never implemented a wage cap before. In any case, Lydon was the only driver for whom the $14.65 wage cap established by Wright resulted in receiving less than the full $3 raise, and Lydon was the only driver who did not receive a $3 raise, other than Desena, who initially was making at least $5 per hour more than any other driver.[13]

The Respondent produced General Counsel Exhibit 5, a chart that Wright had prepared and submitted to the Respondent's Board of Directors at the October 2016 Board meeting.[14] The chart originally showed the effects on product costs of various potential wage increases, but the product cost information was redacted in General Counsel Exhibit 5 by the parties' agreement. The document contained projected product cost effects for ten incremental raises for employees, including drivers, bakers, production workers, and cleaners. For drivers, the raises considered were: $1, $1.50, $2, $2.25, $2.50, $2.75, $3, $3.25, $3.50, and $3.75 per hour. For the other employees, the raises considered were: 25 cents, 50 cents, 60 cents, 70 cents, 80 cents, 90 cents, $1, $1.10, $1.20, and $1.30 per hour. The bakers, production workers, and cleaners received raises of approximately 50 cents in their first paycheck in January 2017, at a different time from the drivers. The state minimum wage rose to $11 per hour in January 2017. In January 2015 and January 2016, the Respondent had similarly granted wages to the "inside" employees due to the change in the minimum wage. With respect to the timing of the drivers' wage increases in November 2016, Wright explained that he recognized that they hadn't received wage increases since 2011, even though other employees had, and he thought it would be nice for them to have a raise before the holidays. There was no other reason given for the drivers' raises to be granted in November rather than in January, like the other employees.[15]

Wright testified that the Board of Directors granted him the authority to decide whether and when to grant the raises and at what rates. He testified that he had complete discretion and that the Board of Directors did not tell him what raises to give, and that he was given free rein to grant raises by the Board of

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[13] At the hearing, the General Counsel orally moved to amend the complaint to allege that the Respondent's singling out Union Steward Lydon for a lower wage rate independently violated the Act, but then withdrew the motion after the Respondent expressly waived its right to assert that it would run afoul of due process for the General Counsel to have failed to raise the allegation in the current complaint. See *Jefferson Chemical Co., Inc.,* 200 NLRB 992, 992 fn. 3 (1994) (Affirming the dismissal of complaint allegations about which the General Counsel had known while litigating a prior, factually-related charge, the Board majority explained that the General Counsel is duty-bound to investigate all matters which are encompassed by a charge, and to proceed appropriately thereafter.) Therefore, although I consider these facts as presented as they relate to the issues before me, I make no specific determination whether Respondent's treatment of Lydon with respect to the wage increases separately violates the Act.

[14] Wright reports to the Board of Directors and attends their meetings, which occur every 4 to 6 months, except in the summer. He testified that no formal notes or minutes are taken at the meetings, although some of the seven directors may take their own notes. He sometimes takes brief notes on an agenda he prepares for the meeting, and typically keeps those filed in his office.

[15] The record does not establish when the Union's organizing of the production workers and cleaners began, or when the Respondent learned of it. It also does not establish whether the bakers are included in this effort. There is an absence of evidence of union organizing activity related to the inside workers as of November 19, 2016, on this record.

Directors at the October meeting. The Board of Directors did not sign off on a specific raise amount. He further testified that he believes that the Board of Directors discussed wage increases and General Counsel Exhibit 5 at the October meeting, but he does not recall what was said or by whom. He does not recall any Board Members taking notes at the October meeting, and he inquired of Board Members whether they had personal notes and no notes were identified. He testified that no formal record, minutes, or notes are kept memorializing Board meetings, although he generally keeps a copy of the agenda he prepares for the meeting, with any notes he has taken on it.[16]

During contract negotiations, the Union initially proposed wage increases to reach $18 per hour, as well as significant health and welfare benefits, including $11 per hour for Teamsters Health & Welfare plan, $1 per hour to Teamsters Pension plan, a 50 percent match up to 6 percent to the Teamsters 401(k) plan, as well as additional personal days and paid holidays. For entry level drivers making $11 per hour, this proposal included a wage increase alone of about 64 percent. The Respondent countered in bargaining with an initial wage proposal was for an increase of 5cents per hour, then shortly moved its offer to 25 cents per hour. Twenty-five cents per hour would have been a 2.2 percent raise for the drivers earning $11 per hour.

In January 2017, the Respondent handed out and posted campaign literature in the Brockton plant related to the Union's efforts to organize the "inside" employees, i.e., the bakers, production workers, and cleaners. This literature identified that the Union had "filed a petition to represent certain Liberty Bakery employees." It was available in Portuguese as well as English.[17] It contained various campaign related statements, including stating that the election will be by secret ballot, that employees can decide for themselves whether they want to join the union, that the Company will not violate that right but prefers to work with employees directly, that a union may mislead employees, because unions want employees' money, and that just signing a union card does not guarantee you more money. Of particular relevance here, the Respondent's campaign literature stated the following (emphases in original):

> Examples of common union tricks are:
>
> . . .
>
> **TRICK 2: Union Promises**- Did you know that the union can make a promise and not have to keep it? Employees do not get a raise just because they join a union. Any changes in your pay, benefits, or other important workplace conditions would *have to be negotiated*. **The law does not even force the Company to agree with union demands.** The Teamsters made many empty promises to the truck drivers that did not come true. After two long years, the drivers still have no contract and want out of the union. We felt that it was time to give them a fair raise and made the decision to do it. The raise was given because it was the right thing to do and **not because the drivers belonged to the union.**

The above excerpt was situated in the middle of a page of text, with white space separating it from the paragraphs before and after it. It was handed out as a 1-page document to all nondriver employees in January 2017. It was also enlarged and posted on walls in the plant's hallway and break room in late-January/early-February 2017.

[16] No such agenda was produced for the October meeting. GC Exh. 5 served as the agenda in October meeting, although it does not contain any notes. As noted above, I continued the hearing for a day, which provided the Respondent additional time to search records in response to the General Counsel's assertion that these historic agendas and handwritten notes were covered by the subpoena, Jt. Exh. 3(a). No formal petition to revoke or motion for sanctions was raised at the hearing, so none was ruled on.

[17] At the hearing, there was testimony elicited about different dialects of Portuguese that may be spoken by some employees, a suggestion that some employees may not read in either English or Portuguese, and whether posters/literature may have been translated into different dialects. This testimony was not entirely clear or consistent. For the purposes of this case, I do not find a need to determine the extent of literacy of the workers. Moreover, I note that no party argued that the extent of the literacy of the workers was a material issue in this case.

ANALYSIS

A. Alleged 8(a)(1) Interrogation

The General Counsel alleges that Supervisor Rodrigues unlawfully interrogated Leonard about his union activity in violation of Section 8(a)(1) by Rodrigues' inquiries of Leonard shortly after coworker Robinson had asked Leonard to sign a paper to get the union out.[18] The Respondent presented no direct evidence to refute this allegation, and did not call Rodrigues to testify, but denies this allegation, arguing that the General Counsel did not establish the violation in its case-in-chief, either because Leonard's statements were too vague or inconsistent to be credited, or because, even if credited, they were not shown to be coercive.

Although Leonard's unrebutted testimony was somewhat vague in part, I find it sufficiently clear to establish what Rodrigues said to him and in what context. Leonard testified that, about a half hour after Robinson approached him to sign a paper to get the union out, Rodrigues asked him, "so, Larry, do you want to sign that?" When Leonard responded, what? Rodrigues responded, "you know what." When Leonard stated, he did not want to get involved, Rodrigues responded, "you are involved." This exchange strikes me as plausible and consistent. Leonard appeared sincere, and testified in a straight-forward manner, without enhancement or exaggeration. His reluctance to talk to Rodrigues about signing the paper was consistent with his reluctance to talk to Robinson about it earlier. His "short and sweet" manner of speech was also consistent with his related testimony that, as he left, he rolled down his window and asked coworker Pierre in simple terms whether Pierre had been asked to sign the paper. He is still employed by the Respondent and testifying against his employer's interest, which lends additional support to my finding his testimony generally credibility.

I have considered that Leonard, who works as an overnight driver, admitted on the stand that he was tired and I observed that his demeanor reflected that he was tired. However, he appeared to do his best to answer the questions as fairly as he could. On cross-examination, Leonard was reminded that in a prior sworn statement he had testified that Pierre reported something different the following day from what he had said in their short conversation in the parking lot. I credit Leonard's response that he did not remember this additional statement on direct exam, but did not dispute that it was his prior testimony. I am not persuaded that this omission was intentional under all the circumstances, or that it weakens Leonard's credibility regarding what Rodrigues said to him. There is no evidence that his memory about the specific statements made to him by Rodrigues were misremembered or inconsistent.

Leonard explained that he understood what Rodrigues meant because Robinson, who had approached him about the signing the paper, was Rodrigues' son-in-law, which suggests that they were closely associated. He also explained that earlier when unloading his truck at the dock, the employees were "in a commotion about the Union gone," that they were glad, and that he was the last to know. The Respondent urges me to determine based on this testimony that the conversation with Rodrigues, if it took place at all, took place after the Respondent had withdrawn recognition. I decline to do so. The

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[18] Complaint pars. 7(a) and 19. The complaint also alleges at par. 7(b) that the Respondent violated 8(a)(1) by soliciting support of a petition concerning the Union. However, on brief, the General Counsel's related arguments are limited to the unlawful interrogation allegation. These separately pled allegations have much in common and the General Counsel relies on the same evidence to establish both. Although the General Counsel has not dropped the separate solicitation allegation, in light of the absence of legal argument presented specific to the solicitation allegation, I dismiss the solicitation allegation and limit my analysis here to the unlawful interrogation allegation. I note that the General Counsel has not alleged or argued that employee support for decertification was tainted by the Respondent's interference or assistance. As discussed below, I have fully considered that the context of the interrogation included an implied encouragement or solicitation to support the decertification effort.

imprecision of Leonard's phraseology may be either colloquial or inarticulate, but it is does not cause me to conclude that "gone" in this context meant the Respondent had already withdrawn recognition. In light of all the circumstances, I find it most reasonable to conclude that Leonard meant that they were talking about the Union "being" gone, without any inferable reference to when the Union might be gone. It also does not make sense that Robinson asked him to sign the paper, or that Robinson offered to show it to him to convince him to sign it, if Robinson had already submitted it to Wright. In contrast, Leonard's testimony that he was surprised to first learn of the decertification effort that day from the commotion at the loading dock, then was asked by Robinson to sign the paper, then was asked about it by Rodrigues, and, finally, asked coworker Pierre about it, presents a logical, credible sequence of events.[19]

The Board determines whether an employer's questioning of an employee about union activity violates 8(a)(1) by considering whether, under all the circumstances, the interrogation would reasonably tend to restrain, coerce, or interfere with Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among factors considered are: (1) the questioner's identity; (2) the place and method of interrogation; (3) the background of the questioning and the nature of the information sought; and (4) whether the employee is an open union supporter. *Scheid Electric*, 355 NLRB 160 (2010); see also *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (above factors described). I find that the under all the circumstances, Rodrigues' questioning of Leonard was coercive and violated Section 8(a)(1) of the Act.

Rodrigues was Leonard's direct supervisor. Although their conversation was brief, casual, and made in the absence of any direct promises or threats of consequences, it was made on the worksite at the conclusion of Leonard's shift. Significantly, the subject of the inquiry was raised by Rodrigues. Leonard was not a union officer or open union supporter, and nothing in the record indicates that Rodrigues had any lawful, noncoercive reason to ask Leonard whether he "wanted to sign that." It is clear from the context of the conversation, that the employees were actively seeking signatures on the paper or petition. The facts that the bargaining unit was relatively small and that Rodrigues has a family relationship with Robinson also contribute to the coerciveness of his questions in this context, as it was reasonable for Leonard to assume Rodrigues knew about the decertification efforts by Robinson. Rodrigues' couched or evasive responses when Leonard tried to deflect from directly responding to his questions support my conclusion that Rodrigues was indeed inquiring about the employees' effort to oust the union, and that Rodrigues understood that he should not be doing so. In this context, Rodrigues' interrogation impliedly—and surreptitiously—encouraged involvement in the decertification effort, even though it did not explicitly solicit that involvement, which contributes to my finding that the nature of the inquiry was coercive. See *Hercules Automotive, Inc.*, 285 NLRB 944, 949 (1987) (an employer violates 8(a)(1) by interrogating an employee about his union sympathies in the context where, "[i]ts purpose was to induce and convince the employees to sign the petition.") Moreover, Rodrigues' inquiry also revealed that he had knowledge of the union activity of other employees, which would reasonably be construed as implied surveillance of union activity, further contributing to its coercive nature. See *Tres Estrellas de Oro*, 329 NLRB 50, 50–51 (1999) (the Board finds an employer has created an unlawful impression of surveillance unlawful when a

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[19] Leonard further testified that he told Lydon about the exchange with Rodrigues. Lydon credibly corroborated that Leonard told him specifically what Rodrigues had said after it was said and shortly before the Union received a withdrawal of recognition. Lydon's testimony was admitted over Respondent's hearsay objections, as the General Counsel asserted it was not offered for the truth of the matter asserted. The Respondent argues on brief that the testimony is hearsay, because it is offered to buttress the truth of Leonard's testimony, and therefore should be excluded. I affirm my ruling to admit this testimony. I find that it is offered as corroborative hearsay evidence to support the timing and substance of the statements made to Leonard, not regarding whether those statements were true. As discussed above, I have credited Leonard's testimony about what Rodrigues said to him and its context, including the timing in relation to the withdrawal of recognition. Although Lydon's testimony corroborates Leonard's testimony, I find Leonard's testimony to be credible and reliable about what Rodrigues said to him, even in the absence of Lydon's corroboration.

reasonable employee would assume from the question or statement that his union activity was under surveillance.)

Based on all of the above, I find that Rodrigues' questioning of Leonard about his union activity was unlawfully coercive. [20]

B. Alleged 8(a)(5) Withdrawal of Recognition and Refusal to Bargain

1. Absence of objective evidence of loss of majority support.[21]

The foundation for a union's exclusive bargaining representative status is majority support of unit employees. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996); *Anderson Lumber Co.*, 360 NLRB 538, 542 (2014), enfd. 801 F.3d 321 (D.C. Cir. 2015). Where, like here, the Union has been certified by the NLRB as the exclusive bargaining agent of employees, majority status is presumed to continue.[22] An employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. [23] *Levitz Furniture*, above, 333 NLRB at 717. An employer can defeat an allegation that its withdrawal of recognition and its postwithdrawal refusals to bargain are unlawful by showing, as a defense, that the union had actually lost majority status at the time it withdrew recognition. Id., accord *Scomas of Sausalito, LLC*, 362 NLRB No. 174 slip op. at 7 (2015) and *Anderson Lumber*, above at 538 and 544. A good-faith but mistaken belief that the Union has lost majority support is not sufficient under this standard. Indeed, the Board stated in *Levitz Furniture*, and has since reconfirmed, that an employer acts at its own peril when it relies on evidence to unilaterally withdraw recognition, because if the Union contests the loss of majority support, the burden is on the Respondent to prove actual loss of majority support. *Levitz Furniture*, above at 725; *Anderson Lumber*, above at 538 and 542; and *Scomas of Sausalito*, above, slip op. at 1 and 6.

In this case 9 out of the 14 bargaining unit employees signed the "informative page," a clear majority of the bargaining unit. It is evident from the context, as well as Robinson's affirmation in the handwritten clarification, that the page was signed by employees after the conclusion of the certification year, and therefore, to the extent it represents employee sentiment of some kind, it does so for a period

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[20] I have considered that the Respondent did not call Rodrigues to testify about his conversation with Leonard. No explanation was offered why Rodrigues was not called to refute the allegation. Based on this failure to call Rodrigues, on brief, the General Counsel urges me to reach an adverse inference to conclude that Rodrigues violated Section 8(a)(1). A judge may make an adverse inference about the failure of a party to call a witness assumed to be favorably disposed to the party. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F2d 720 (6th Cir. 1988). Here, Rodrigues remains employed as a supervisor for the Respondent and would be uniquely suited to refute the testimony about an alleged conversation he had with an employee. I infer from the failure to call Rodrigues that his testimony would not have undermined or refuted Leonard's testimony. I decline to make the more comprehensive adverse inference to conclude that the failure to call Rodrigues alone entitles the General Counsel to a favorable disposition on the complaint allegation, as the Respondent was entitled to leave the government to its proof. Compare *Ridgewell's Inc.,* 334 NLRB 37, 42 (2001), enfd. 38 Fed. Appx. 29 (D.C. Cir. 2002), and *Spurlino Materials, LLC*, 357 NLRB 1510, 1521(2011), enfd. 805 F.3d 1131 (D.C. Cir. 2015).

[21] Complaint pars. 11, 12, 13, and 21.

[22] This presumption is irrebuttable during the first year that a bargaining unit is certified and during the first three years of a collectively bargained agreement, but becomes rebuttable at other times. Here, there is no dispute that the withdrawal of recognition occurred after the certification year had run and before there was agreement on a collectively-bargained contract, and therefore that the Union's presumption of majority status was rebuttable. *Levitz Furniture*, 333 NLRB at 720 fn. 17.

[23] In *Levitz Furniture*, the Board overruled *Celanese Corp.,* 95 NLRB 664, 671–673 (1951), which had affirmed a different standard, i.e., that an employer may withdraw recognition of a union based on a reasonable good-faith doubt as clarified by the Supreme Court in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 367 (1998), to be a "genuine, reasonable uncertainty" as to majority support. *Anderson Lumber,* above.

when the Union's presumption of majority support was rebuttable.[24] Wright testified that he recognized the signatures on the page to be those of the nine employees, and there is no evidence on this record that the signatures are legally invalid. Nevertheless, I find that the record lacks sufficient evidence to establish what the employees meant to assert, affirm, or commit to by signing this informative page. Notably, the page does not contain a statement for employees to attest to, such as "we the undersigned employees want . . . ." Nor is it labeled or entitled "Petition for Decertification" or "petition" for anything. Although the signed page resembles a petition, it does not objectively establish that each of these nine employees no longer wished to be represented by the Union. The signed page contained information about how to seek a Board conducted secret-ballot election to determine whether the Union retained majority status as well as a statement about how an employer could lawfully withdraw recognition. Although these nine signatures, even without a clarification as to each signatories' intent, would support the Respondent reasonably determining there was uncertainty about the continued support for the Union, they do not establish that the Union had actually lost majority support.

The Board carefully examines the language on a petition, together with other objective evidence, to determine whether an employer could reasonably interpret the petition to establish that a majority of employees no longer support the union. Whether the language is ambiguous is one factor the Board considers to determine whether a respondent has met its burden under *Levitz Furniture* to show by a preponderance of evidence that the union had actually lost majority support at the time it withdrew recognition. *Anderson Lumber*, above at 538 and 542–544; *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 818–819 (2007). But, a respondent's reliance on ambiguous proof must be based on a reasonable interpretation of that proof in light of all the objective evidence. *Anderson Lumber*, above; *Wurtland Nursing*, above. Compare *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1284–1286 (2006) (a petition containing the requisite number of valid signatures that unequivocally stated that employees do not support the union and that they seek a withdrawal of recognition was sufficient proof to establish loss of majority support), and *Highlands Regional Medical Center*, 347 NLRB 1404, 1404–1406 (2006) (a petition entitled "Showing of Interest for Decertification" supported by other objective evidence that showed employees sought an election as opposed to a withdrawal of recognition, failed to establish that the employees no longer supported the Union). In *Wurtland Nursing*, the Board found that a petition stating that employees "wished for a vote to remove the Union" was sufficient to establish an actual loss of majority support, because the Board found that it was a more reasonable interpretation that employees wished to end the union's status as their exclusive collective-bargaining representative. In contrast, there is no statement of employees' intent—whether clear or ambiguous—on the signed page initially submitted to the Respondent in this case.

The signed "informative page," does not make clear on its face what the signers intended as initially submitted to the Respondent (Jt. Exh. 1(H)), and the updated signed page (Jt. Exh. 1(I)) establishes only Robinson's intention. The Respondent did not explain on what basis it could rely on Robinson's post-hoc representation regarding the other employees' intentions. Neither Robinson nor the other signatories testified, and there is an absence of evidence regarding what, if anything, Robinson said to Wright about the collection of signatures. Significantly, Wright did not testify that he had reason to know what was said to the employees when he received either the signed page or the updated signed page from Robinson. In fact, there is no evidence that the other employees were even consulted regarding Robinson's addition of the clarifying language to the page they already had signed. Nor is it established that the employees selected Robinson to represent them, or authorized him to either represent them or to

[24] Robinson and two other drivers approached Wright on May 25, 2016, with questions about how to oust the Union. Wright gave Robinson the first version of the informative page a few days later, and the signed version that was first returned to Wright on July 19, 2016. It is clear from this context that the employees signed the page sometime between May 25 and July 19. As the Union was certified on May 8, 2015, I conclude that the signatures were collected after the certification year had concluded.

clarify their intent. Thus, in the absence of objective evidence regarding the meaning of the employees' signatures on the informative page that described two different outcomes, the Respondent could not rely on either the initial page or the updated page as objective evidence that the signatories no longer wished to be represented by the Union, as opposed to evidence of a desire for a Board-conducted election or of some other desire, purpose, or understanding. Moreover, Wright asked Robinson to add the clarifying language after consultation with the Respondent's legal counsel, which reveals that the Respondent understood at the time that the intent of the employees' signatures was not clear. On this record, the Robinson's handwritten changes to the informative page did not transform an otherwise objectively unclear statement about the employees' intent to one with sufficient strength to support a finding of actual loss of majority support.

Although the evidence does not fully establish what was said to Wright by the three employees who approached him on May 25, even assuming it would be reasonable for Wright to conclude based on that meeting and their signatures on Joint Exhibit 1(H) that the three, including Robinson, rejected the Union, this would establish only that 3 out of 14 bargaining unit employees no longer wanted to be represented by the Union, which is significantly less than a demonstrable loss of majority support.[25]

I find, therefore, that the Respondent's withdrawal of recognition of the Union in July 2016, and its subsequent failure and refusal to bargain with the Union as the exclusive collective-bargaining representative of its drivers, violated Section 8(a)(5) and (1) as alleged.

2. Absence of a Board election. [26]

In the alternative, the General Counsel alleges that the Respondent violated 8(a)(5) and (1) by refusing to meet with the Union and by withdrawing recognition "absent the results of a Board election." At the hearing, the Respondent conceded the underlying facts that it withdrew recognition and refused to meet with the Union unilaterally and in the absence of a Board election, but maintained that these facts did not constitute a violation of the Act (Tr. 10). In accord with the Respondent's Answer and its arguments both at the hearing and on brief, I find based on current Board law that this allegation lacks merit and it is dismissed.[27]

As discussed above, the Board's standard established in *Levitz Furniture,* does not require that the Respondent file an RM petition or await a Board election before withdrawing recognition; rather, as the Board explained in *Levitz Furniture*, a respondent may withdraw recognition based on objective evidence of actual loss of majority support or may file an RM petition based upon evidence supporting a genuine uncertainty as to the union's retention of majority support. (333 NLRB at 717.) *Anderson Lumber, above.* On brief, the General Counsel urges the Board to reconsider the *Levitz Furniture* standard, arguing that the *Levitz Furniture* standard has proved to be unworkable and that the Board should require that a respondent await the results of a Board election before withdrawing recognition of a certified bargaining unit. The facts of this case may present facts in accord with the General Counsel's policy perspective, as the evidence supports a finding that the Respondent had, in good faith, a reasonable uncertainty as to the Union's retention of majority support sufficient to support an RM petition; yet, as I have found above, the objective evidence fails to prove that the Union had actually lost of majority support on July 25, 2016. (Id.)

[25] The Respondent's argument that there was bound to be a loss of support, due to the close election tally in May 2015 and the subsequent failure of the parties to achieve a collective-bargaining agreement in the first year is speculative and misplaced. There is no basis to assume in the absence of reliable, objective evidence that either support/nonsupport for the Union remained steady after the Union was certified or that any employees changed their allegiances.

[26] Complaint pars.11, 12, 14, and 21.

[27] The Respondent also argues that the General Counsel acted outside his statutory authority by making these complaint allegations and by arguing in favor of a change in Board law. Based on my dismissal of these allegations on other grounds, I find it unnecessary to address this additional argument.

Of course, as an administrative law judge I have no authority to adopt a new standard; it is left to the Board, at its discretion, to determine whether to reconsider the efficacy of its established legal standards on the facts of this or any other case.

C. Alleged 8(a)(5), (3), and (1) Wage Increases

1. Wage increases as unilateral changes without notice and opportunity to bargain.[28]

Because I have found that the withdrawal of recognition was unlawful, I further find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the drivers' wages in November 2016 without providing the Union prior notice and an opportunity to bargain. An employer must maintain the terms and conditions of employment of represented employees until it has bargained with the union about changes and reached agreement or impasse. *U.S. v. Katz*, 369 U.S. 736 (1962). It cannot, therefore, make substantive changes in terms and conditions of employment without providing the Union with prior notice and an opportunity to bargain. The November 2016 wage increases were admittedly implemented without prior notice to the Union, because the Respondent mistakenly believed that the Union had lost majority support and that its bargaining obligation had therefore ceased. The wage increases were out of the ordinary, not previously planned, and entirely discretionary, and the Respondent has presented no defense other than its belief that it was not required to bargain about the change. As discussed above, however, the Respondent withdrew recognition at its own peril. *Levitz Furniture*, 333 NLRB at 725.The Respondent remained obligated to recognize and bargain with the Union, and its responsibility to maintain the status quo in terms and conditions of employment until it had consulted with the Union as the employees' exclusive collective-bargaining representative remained in effect. By disregarding these obligations and unilaterally changing wages the Respondent violated Section 8(a)(5) and (1). *Mesker Door, Inc.*, 357 NLRB at 598.

2. Wage increases to discourage union support.[29]

The General Counsel alleges that the Respondent also violated Section 8(a)(3) and (1) by granting the November 2016 wage increases. I have found above that the wage increases were unlawful because the Respondent failed to provide the Union with notice and opportunity to bargain about the changes, and it may not materially affect the remedy to also find that the wage increase was discriminatory, as alleged. However, I leave that determination to the Board, and proceed with considering the 8(a)(3) and (1) allegations. As discussed below, I find that the Respondent's reasons for the significant wage increases were pretextual, and I find, based on the preponderance of the evidence, that the wage increase violated Section 8(a)(3) and (1) as it was designed to discourage union activity and/or to reward the drivers' perceived rejection of the Union.

The cases the General Counsel points to concern wage increases during a union campaign or during the "critical period" before a union election while a representation petition is pending. The Supreme Court has held that the Act "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of infringing upon their freedom of choice for or against unionization." *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964). Where such conduct is asserted to have violated Section 8(a)(3), the Board often uses its *Wright Line* dual motive analysis to assess the evidence.[30] *Clock Electric*, 338 NLRB 806 (2003). Whether considered as an 8(a)(1)

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[28] Complaint pars. 15, 17, 18, and 21.

[29] Complaint pars.15, 16, and 20.

[30] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, (1983) (approving *Wright Line* analysis). Under *Wright Line*, the General Counsel must show that a Respondent's employment action was motivated, at least in part, by

or 8(a)(3) violation, there is an assessment of the respondent's motive.[31] In *Exchange Parts*, the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. Ultimately, "[t]he lawfulness of an employer's conferral of benefits during a union organizing campaign depends upon its motive." *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016).

In this case, there was no union election pending and there is insufficient evidence that the wage increase took place during a union organizing campaign.[32] Still, I am persuaded that the *Exchange Parts* rule applies, because the Respondent chose to withdraw recognition and the Union contested the withdrawal of recognition. The status of the Union as the exclusive bargaining representative of the Respondent's drivers was therefore put into question. This status puts the relationship of the employees to their union in the same kind of vulnerable position as it would be during the pendency of an election. The Board has determined that the rule set out in *Exchange Parts* is also applicable to the granting of benefits during an organizational campaign but before a representation petition has been filed. *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006). Therefore, the absence of the pendency of a representation petition does not foreclose the application of this doctrine. Here, by filing the unfair labor practice charges in this case in order to retain its representative status, the Union has acted toward these employees in a manner akin to an organizing campaign—the Union essentially has reasserted an effort to reaffirm union support. I find it appropriate to apply the *Exchange Parts* standard in this case.

Liberty clearly knew that the representation status of the drivers was in question when it granted the November 2016 wage increases, as it withdrew recognition and certainly was aware of the Union's opposition to the withdrawal of recognition. The Board infers both improper motive and interference with Section 7 rights when an employer grants benefits during an organizing campaign without showing a legitimate business reason. *Vista Del Sol Healthcare*, above; *ManorCare Health Service-Easton*, 356 NLRB 202, 222 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011). Here, as I have discussed above, I find that the Union's status was akin to a union engaged in an organizing campaign. I also find that the Respondent failed to show a legitimate business reason for the wage increase. The wage increase cannot be defended as being part of a regular, typical, or planned wage increase. Wright admitted that he made the decisions based on complete discretion granted to him by the Board or Directors, and that he did what he thought was the right thing to do. He also had never given a similarly large wage increases before. I find Wright's

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antiunion animus. If it shows that the employees engaged in union activity, that the Respondent knew of union activity or union affiliation, and that the Respondent harbored antiunion animus, the General Counsel establishes an inference that antiunion animus was a motivating factor. The evidentiary burden shifts to the Respondent to show that it would have taken the same employment actions even in the absence of the union activity or affiliation.

[31] The General Counsel cites to *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 4, fn. 9 (2016), in which the Board, without substantive explanation, found an 8(a)(3) violation applying reasoning of the *Exchange Parts* line of cases. In *Hogan Transports*, the Board found that the wage increases granted during an organizing campaign violated Sec. 8(a)(3), as the timing of the increase permitted an inference of unlawful motive, and the Respondent failed to establish that the decision to grant wage increases had been made in the absence of the union's presence. Accord: *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961–962 (2004) (unscheduled pay raise during union organizing campaign violated Sec. 8(a)(3) when Respondent was unable to offer a credible explanation for the timing of a pay raise). As the remedy for 8(a)(1) and 8(a)(3) discriminatory wage increase violations are the same, I follow the Board's lead and consider this violation under both subsections of the Act.

[32] The General Counsel argues that *Exchange Parts* standard applies because an organizing campaign was going on contemporaneously concerning the nonbargaining unit employees (production workers and cleaners). However, on this record, the General Counsel has not established when that organizing campaign began, whether it was going on in November 2016 when the drivers' wages were increased, or when the Respondent learned of it. The record evidence establishes campaign activity in January 2017. Therefore, I do not rely on the organizing efforts related to the production workers and cleaners in my application of the *Exchange Parts* standard in this case.

explanations for the timing and the amounts of the wage increase to not be credible. His testimony about the reasons for the wage increase, including his testimony about the October 2016 Board of Directors meeting was vague and nonspecific at times, which I found indicative of evasiveness.

By all accounts, the general increase of $3 per hour was a drastically larger increase than had been typically granted. Wright's explanation that the amount was consistent with the $1 annual minimum wage increases over the past 3 years seems plausible on its face, but the Respondent did not show a pattern or practice of granting even its lower wage employees a full $1 increase when the minimum wage increase went up—the typical increases were 25 to 50 cents. I find it particularly telling that the confluence of discretionary rules caused the union steward, Lydon, to receive the least favorable wage increase. In particular, Wright's explanation that he established a wage cap of $14.65, for no reason—a wage cap that negatively affected *only* the union steward—strikes me as pretextual. Wright admitted he had never set a wage cap before and, clearly, the rule was malleable according to his discretion, as it did not apply to employee Tavares. Although it seems reasonable that Desena, who was already making more than the $14.65 "cap" might be treated differently, Wright's explanation for granting Tavares the $3 increase, which brought his wage rate to $15.60, well above the "cap," when it had been comparable to Lydon's initially, strikes me as a pretextual, post-hoc explanation—there was no explanation for why his duties as a mechanic did not cause him to receive a higher rate before November 2016. Wright offered no explanation for why he set the $14.65 "cap." In any case, the Respondent has failed to establish that its unprecedented, completely discretionary $3 raise and its completely discretionary $14.65 wage cap, both of which it chose not follow at its own discretion, were based on legitimate business reasons.

Although it is true that a privately held company may manage its operation and its recordkeeping as it sees fit, I find it inconsistent and not credible that Wright would have taken the time to prepare the detailed proposed wage increases described in General Counsel Exhibit 5 to then have the Board of Directors provide no substantive feedback regarding the multiple options. Under the circumstances, I also do not credit that Wright was unable to recall with any specificity what was said about these issues at the meeting. There were unfair labor charges pending and the Union had raised a question regarding the legitimacy of the withdrawal of recognition—it is more likely that the owners had substantive discussions with Wright about General Counsel Exhibit 5 and the effects of potential wage increases than that they looked at it and simply told him to do what he thought was the right thing to do. Even if that was the conclusion, there was no doubt discussion that Wright was reluctant to share.

I also found Wright's explanation for the timing of the November 2016 wage increases to be unconvincing. Again, it was not consistent with past practice to provide wage increases at that time. In contrast, and consistent with past practice, he granted wage increases to the other employees in the first paycheck of the 2017. Thus, the timing of the November 2016 raises reflects that he treated the drivers differently from other employees, as well as differently from the way the drivers had been treated in the past. Wright's partial explanation that he wanted to do something nice for the drivers before the holidays to boost morale and that they had not had a raise in years because of the Union negotiations is consistent with my conclusion that the timing of the wage increases was indeed related to Wright's belief that the drivers had shown disaffection from the Union.[33] Based on the above, I find that Respondent has not met its burden to establish a legitimate business reason for granting the November 2016 wage increases.[34] See,

[33] Moreover, the Respondent articulated a connection between the wage increases and union representation when, in January 2017, it emphasized in a campaign poster that the drivers' wage increases were not the result of Union negotiations, but based on the company's sole discretion and desire to do the right thing. By the January 2017 posters, the Respondent takes credit for rewarding the drivers with the wage increases in the context of the drivers' purported rejection of the Union.

[34] There were no surface bargaining or other bad-faith bargaining allegations related to the parties' pre-withdrawal negotiations alleged in the complaint, and I make no such findings.

e.g., *Latino Express*, 361 NLRB No. 137 (2014), reaffirming 358 NLRB 822 (2012) (Board found no legitimate reason for wage increase where employer failed to establish a competitive need for the wage increase, failed to present evidence that it was considering the increase before it knew of the union drive, and failed to communicate to employees that the increase was unrelated to the organizing drive); and *Sisters Camelot*, 363 NLRB No. 13 (2015) (Board found no legitimate business justification for raises during a union campaign where no past practice of making similar changes).

I find, in the alternative, that the granting of the November 2016 wage increase violated Section 8(a)(3) and (1) pursuant to *Wright Line*. Clearly, there was employer knowledge of union activity and antiunion activity before the wage increases were made. Antiunion animus can be inferred from the 8(a)(1) interrogation supported by the pretextual nature of the reasons given for the wage increase, the unusual amount of the wage increases, the timing of the wage increases, and the inconsistent application of the $3 wage increase and the $14.65 per hour "cap." Moreover, the Respondent's intent can be inferred from the post-implementation statements in the January 2017 posters and the explanation by Wright at hearing that tend to blame the Union or the negotiations with the Union for the prior lack of wage increases. See, e.g., *Atlantic Forest Products*, 282 NLRB 855 (1987), and *Truss-Span Co.*, 236 NLRB 50 (1978) (an employer violates 8(a)(1) when it blames a union for lack of raises). The General Counsel has met its burden to show that the Respondent was motivated, at least in part, by antiunion animus when it implemented the November 2016 wage increases. Above, I have found that the Respondent failed to establish a legitimate business reason for the November 2016 wage increases and that the reasons given were pretextual. I further conclude that the Respondent has failed to meet its burden under *Wright Line* to show that it would have implemented the November 2016 wage increases at the time and in the amounts that it did, in the absence of the union and antiunion activity.[35]

For the above reasons, I find that the Respondent violated Section 8(a)(3) and (1) by its implementation of a wage increase in order to discourage Union support or to encourage or reward disaffection from the Union.

CONCLUSIONS OF LAW

1. The Respondent, Liberty Bakery Kitchens, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, The International Brotherhood of Teamsters, Local 653, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been the exclusive representative for the purposes of collective bargaining of the employees in the following bargaining unit pursuant to 9(a) of the Act:

> All full-time and regular part-time drivers employed by the Employer at its 125 Liberty Street, Brockton, Massachusetts facility, but excluding office clerical employees, all other employees, guards, and supervisors, as defined in the Act.

4. By interrogating an employee about whether he would sign a paper in support of a decertification effort, the Respondent violated Section 8(a)(1) of the Act.

[35] Contrary to the implication by both parties in their briefs, an employer does not have to be shown to be an overall "bad actor" in order to be found to have engaged in a particular act that violates 8(a)(3).

5. By refusing to bargain with the Union as the exclusive representative for the purposes of collective bargaining of the bargaining unit employees beginning on July 25, 2016, and thereafter, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By withdrawing recognition from the Union on July 25, 2016, absent an actual loss of the Union's majority status, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. By unilaterally granting wage increases to bargaining unit members in November 2016, without giving the Union notice and opportunity to bargain about the changes, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. By granting wage increases in November 2016 in order to discourage Union support or to encourage or reward perceived rejection of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

9. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act, the Respondent shall be ordered to cease and desist from engaging in such conduct and take certain affirmative action designed to effectuate the policies of the Act. Most importantly, in order to restore the status quo ante, in light of Respondent's withdrawal of recognition and refusal to bargain with the Union, Respondent must recognize and bargain with the Union for a reasonable period of time as the bargaining representative of unit employees.

An affirmative bargaining order is a reasonable exercise of the Board's broad discretionary remedial authority. *Caterair International,* 322 NLRB 64, 64–68 (1996). As the Board stated in *Anderson Lumber,* 360 NLRB 538 (2014), "We adhere to the view that an affirmative bargaining order is 'the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.'" Id., slip op. at 1, quoting *Caterair,* above*,* 322 NLRB at 68. Noting disagreement with the United States Court of Appeals for the District of Columbia Circuit regarding a requirement to justify the imposition of a bargaining order in each case, the Board nevertheless found a bargaining order was justified in *Anderson Lumber* pursuant to the District of Columbia Circuit balancing test as set out in *Vincent Industrial Plastics v. NLRB,* 209 F.3d 727, 738 (D.C. Cir. 2000). On similar facts, the same analysis applies here.

The Respondent must bargain on request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement. The Respondent is required to meet to negotiate with the Union at reasonable times and reasonable places.

The restoration of the status quo ante requires that the Respondent must, on request from the Union, continue the terms and conditions of employment until changed through collective bargaining with the Union. In accord with Board practice and equitable considerations, the recommended Order will not require the rescission of the unlawful wage increases, absent a request from the Union. The Respondent shall post an appropriate informational notice, as described in the attached appendix. The General Counsel requests that, in addition, the Respondent be required to read the notices to employees at an all employee meeting. This remedy is atypical and generally ordered in situations when there is a showing that the Board's traditional notice remedies are insufficient, such as when a respondent is a recidivist violator of the Act, when unfair labor practices are multiple and pervasive, or when circumstances exist that suggest employees will not understand or will not be appropriately informed by a notice posting. Here, the violations are serious, but I do not find circumstances to warrant a notice reading remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Liberty Bakery Kitchen, Inc., Brockton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative for the following bargaining unit of its employees:

> All full-time and regular part-time drivers employed by the Employer at its 125 Liberty Street, Brockton, Massachusetts facility, but excluding office clerical employees, all other employees, guards, and supervisors, as defined in the Act.

(b) Interrogating employees about their union activity or support, including interrogating employees in a manner that impliedly solicits their rejection of the Union and/or impliedly reveals surveillance of the union activity of other employees.

(c) Withdrawing recognition of the Union as the exclusive bargaining representative of bargaining unit employees in the absence of objective evidence that the Union has actually lost the support of a majority of bargaining unit employees.

(d) Granting wage increases to bargaining unit employees or otherwise changing their terms and conditions of employment without providing the Union with prior notice and opportunity to bargain about the changes.

(e) Granting wage increases to employees or otherwise changing their terms and conditions of employment in order to discourage union support, or to encourage or reward employee disaffection from the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

(b) Upon request of the Union, bargain with the Union as the exclusive bargaining representative of unit employees about terms and conditions of employment, and if an agreement is reached, embody the understanding in a signed agreement.

(c) Upon request of the Union, rescind the unlawful wage increase granted to unit employees on November 19, 2016. This Order shall not be interpreted to require the rescission of the wage increases absent the Union's request.

(d) Within 14 days after service by the Region, post at its facility in Brockton, Massachusetts, copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region One, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings. The Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since July 25, 2016.

(e) Within 21 days after service by the Region, file with the Regional Director of Region 1 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provision of this Order.

Dated at Washington, D.C., May 25, 2017.

Elizabeth M. Tafe
Administrative Law Judge

[36] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT withdraw recognition from and fail and refuse to bargain with International Brotherhood of Teamsters, Local 653, AFL–CIO (the Union) as the exclusive collective-bargaining agent of a bargaining unit of our Delivery Drivers.

WE WILL NOT ask you about your union activity or affiliation, including, WE WILL NOT ask you about your union activity or affiliation in a way that implies we want you to sign a document rejecting the Union or in a way that implies we have been watching the union activity or affiliation of other employees.

WE WILL NOT change your wages, hours, or other terms and conditions of employment, including WE WILL NOT grant wage increases, without first notifying the Union and giving the Union an opportunity to bargain about the changes.

WE WILL NOT change your wages, hours, or other terms and conditions of employment, including WE WILL NOT grant wage increases, in order to discourage union support, or to encourage or reward employee disaffection from the Union.

WE WILL NOT in any similar way interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal law, described above.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our Delivery Drivers concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, only if requested by the Union, rescind the wage increases granted to our Delivery Drivers in November 2016.

LIBERTY BAKERY KITCHEN, INC.
(Employer)

Dated: ______________________________ By: ____
(Representative (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
10 Causeway Street, 6th Floor, Boston, MA 02222–1072
(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-181081 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6700.